

1826149 (Migration) [2020] AATA 4387 (14 October 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1826149

MEMBER: Hugh Sanderson

DATE: 14 October 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 14 October 2020 at 3:48pm

CATCHWORDS

MIGRATION – (Partner) (Temporary) (Class UK) visa – Subclass 820 (Partner) – application made more than 28 days after last substantive visa held – compelling reasons for not applying criterion – validly married – applicant’s three periods as unlawful non-citizen, one deportation and unsuccessful protection visa application – sponsor’s previous family violence, current IVF treatment, physical and mental health and overseas travel – COVID-19 travel restrictions – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 65, 359AA

Migration Regulations 1994 (Cth), Schedule 2, cl 820.211(2)(d), Schedule 3, criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Singh v Minister for Home Affairs [2020] FCCA 3180

SZOXP v MIBP [2015] FCAFC 69

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 August 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d) because the delegate found the applicant did not hold a substantive visa at the time of the application and did not satisfy criterion 3001 of the Schedule 3 criteria. Further, the delegate was not satisfied there were compelling reasons for not applying those criteria.

Background

4. The applicant is a citizen of Malaysia and is currently [Age] years old. His parents and [siblings] continue to live in Malaysia. He first entered Australia [in] February 2010 using the name [Alias]. He remained in Australia as an unlawful non-citizen until he was located and deported from Australia [in] August 2012. The applicant returned to Australia on a [temporary] visa using his current name. He did not disclose the fact that he had previously been deported from Australia. His [temporary] visa ceased on 23 February 2013. He remained in Australia after that date as an unlawful non-citizen. He has not held a substantive visa since that time.
5. The applicant applied for a Protection visa on 22 January 2015. This application was refused by the Department and that decision was affirmed on review before the Tribunal. Appeals by the applicant to the Federal Circuit Court and to the Federal Court were dismissed with the applicant ordered to pay the Department's costs. After the applicant's appeal to the Federal Court was dismissed he remained in Australia as an unlawful non-citizen. He was granted a Bridging visa on departure grounds on 26 July 2017. He then applied for the current visa.
6. The sponsor of the applicant is [Ms A]. She was born in [Country 1] and is currently [Age] years old. She was granted a Partner visa to live in Australia based on her marriage to her former husband. They were divorced in 2015. She is an Australian citizen.
7. The sponsor's movement records show that she has travelled overseas as follows:
 - From [January] 2017 to [March] 2017;
 - From [Date 1] September 2017 to [Date 2] September 2017;
 - From [January] 2018 to [February] 2018;
 - From [July 2019] to [September] 2019; and
 - From [November] 2019 to [January] 2020.

8. The parties claim they first met each other [in] August 2016. Their relationship developed after that time and they were married [in] August 2017. The applicant provided statements from friends stating that they believed the relationship was genuine. Other documents were provided to support the claim that the parties were living in a genuine and continuing relationship.
9. The Department noted the applicant did not hold a substantive visa at the time of the application and invited him to provide compelling reasons for not applying the Schedule 3 criteria. The applicant's agent wrote to the Department making submissions including the following:
 - The parties were planning to have a family together through IVF and this would be complicated if the applicant were not able to remain in Australia;
 - If the sponsor fell pregnant, she would be reliant upon the applicant for her support;
 - The sponsor suffered family violence in her previous relationship and she now relies upon the applicant for her emotional stability; and
 - The parties are in a genuine relationship and provide each other with a high degree of support.
10. The delegate who considered the application noted the applicant did not hold a substantive visa and did not satisfy criterion 3001 of the Schedule 3 criteria. When considering whether there were compelling reasons for not applying those criteria the delegate noted the following:
 - There was no evidence that the parties had ever lived together before their marriage and the applicant had not referred to the sponsor at any time in his previous dealings with the Department;
 - There was no information of the parties undertaking IVF treatment and the wish to have a family together is a typical desire of most couples and would not be considered a compelling reason for not applying the Schedule 3 criteria;
 - The fact that the sponsor had a previously unsuccessful relationship is typical among many people and there is no evidence that she suffered family violence or has any mental health problems arising from the end of her previous relationship;
 - It is reasonable to expect a certain level of hardship for any couple where there is an application for an offshore Partner visa;
 - The applicant committed to the relationship only at the time that his Protection visa application had been refused;
 - The applicant has a poor immigration history and appears to have manipulated his circumstances to be able to remain in Australia without any valid reason;
 - The applicant was assessed as being an untruthful witness when his Protection visa application was assessed by the Tribunal (differently constituted); and
 - The applicant had remained in Australia as an unlawful non-citizen on three occasions showing a disregard for Australia's immigration laws.

11. Taking these matters into account, the delegate was not satisfied there were compelling reasons for not applying the Schedule 3 criteria. Accordingly, the delegate found the applicant did not meet the criteria in cl.820.211(2)(d) and refused the application.

Information to the Tribunal

12. The applicant provided a letter from [an IVF services provider] stating that the sponsor had undergone IVF treatment and had successfully frozen two fertilised embryos. A letter from the IVF provider dated 20 July 2020 stated that they had undergone a thaw process for one of the fertilised embryos on 27 May 2020 which was unsuccessful.
13. The applicant's agent made submissions where the following was claimed:
- The applicant had been previously poorly advised by migration agents which was why his immigration history was not good;
 - The current COVID-19 pandemic means that any separation of the applicant and sponsor will be uncertain and cause further hardship for the parties;
 - The parties are attempting IVF and any separation will cause further stress in the delay in any successful treatment and any separation will cause them further stress and jeopardise any successful treatment;
 - The sponsor was previously in a relationship where she suffered family violence and is dependent on the applicant for emotional support; and
 - The parties have been in a long-term relationship and are dependent on each other.
14. The applicant appeared before the Tribunal by video on 18 August 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages. The applicant was represented in relation to the review by his registered migration agent who attended by telephone.
15. The Tribunal commenced the hearing by explaining to the applicant the process under s.359AA of the Act. The Tribunal explained to the applicant that it would be putting to him information which would be the reason, or a part of the reason, for affirming the decision under review. It would explain what the information was, why it was relevant and then invite the applicant to comment on or respond to the information. If he required more time to comment on or respond to the information, he could request an adjournment.

Evidence of the applicant

16. The applicant said that he had been living with the sponsor in [Town 1] for about one and a half years. Before that, he had been living with the sponsor and her brother in Melbourne. He said that apart from her brother the sponsor had no other family members who are residing in Australia, although other family members had visited.
17. The applicant said that he has his parents, a brother and [sisters] who continue to live in Malaysia. He said that his father has a business in the [produce] markets selling [product]. He said that he had been in the business for a long time and his father had no problems in that business or living in Malaysia.
18. The applicant claimed that he had not been working for about two or three years because he did not have work rights. The Tribunal noted that he had paid almost \$14,500 in his debt to

the Commonwealth after the Tribunal had raised his debt arising from Court cost orders with him in July 2020. He said that he was able to repay the debt to the Commonwealth because his wife had sold her home and there was cash available.

19. The applicant claimed that he had been living with the sponsor since March 2017, before they were married. The Tribunal asked the applicant about the sponsor's overseas travel. He said that she had travelled every year overseas. He said that he thought she would spend about two months overseas and had last travelled overseas for two months, returning in September 2019. He said that she had not travelled overseas after that. He confirmed that he and the sponsor were together on New Year's Eve 2019–2020.
20. The Tribunal referred to the process under s.359AA of the Act set out above. The Tribunal referred to the sponsor's movement records which showed that she had travelled overseas [in] November 2019 and returned [in] January 2020. This was relevant as the applicant said that she had not travelled overseas since September 2019 and was inconsistent to the information provided by the applicant, particularly when the applicant had stated that he was with the sponsor on New Year's Eve 2019–2020. This undermined the claims that the parties were living together or that the nature of the relationship the parties had would provide a compelling reason for not applying the Schedule 3 criteria. This indicated the applicant was not aware of significant events in the sponsor's life.
21. The applicant responded by saying that the sponsor returned to Australia before January 2020. He said that his memory is poor and the sponsor returned before January 2020. He was not able to provide any responses to why he could not remember the later trip or any other aspect of the issues raised by the Tribunal. He just said that his memory was bad.
22. The applicant said that the sponsor was working [doing Job task 1]. He said that before that she was doing [Job task 2] work. He said that throughout their relationship the sponsor was usually working and always found work to do.
23. The Tribunal asked the applicant if the sponsor had required any other medical treatment apart from the IVF. The applicant said that the sponsor had tried to see a psychologist but could not do this because of COVID-19 restrictions. He said that she had only tried to see a psychologist about two weeks before the hearing.
24. The applicant said that there had been delays in getting IVF because the sponsor had a problem with her uterus and went to [Country 1] to have her uterus removed. He said that despite this she would still be able to get pregnant through IVF and have a baby.
25. The Tribunal invited the applicant to provide any compelling reasons why the Schedule 3 criteria should not be applied. He said that he had to be with the sponsor and to look after the sponsor as she was on her own in Australia. He said that it was only her brother who was also living in Australia.

Evidence of the sponsor

26. The sponsor said that she had been living in [Town 1] since the end of September 2019 after she had sold her home in Melbourne. She said that she was now working in a [Workplace] [doing Job task 1]. She said that when she was living in Melbourne she was studying. She said that her husband had a [business] but as he did not have work rights she was now running the business. She said that the applicant does not do anything with the business apart from answer telephones. She said a lot of the work comes from Chinese and Malaysians and as she does not speak Malay or Chinese her husband speaks to these people. She claimed that he was not working.

27. She said that when she was living in Melbourne the applicant maintained a home in [Town 1] where he would stay for three or four days and then she would go to [Town 1] for three days over the weekend. She said that she was a student and also working as a [Job task 2]. She gave confused evidence as to when she stopped working as a [Job task 2].
28. The sponsor said that she travelled to [Country 1] to have an operation to remove fibres on her uterus which were preventing her from falling pregnant. She said that this had delayed her ability to undertake IVF treatment.
29. The sponsor said that she was trying to see a psychologist because she is suffering from stress and relies upon the applicant for her emotional support. She said that despite having IVF treatment and regularly seeing her GP, none of the health professionals she had consulted had ever recommended that she go and see a psychologist.
30. The sponsor said that she had not seen or had any contact with her former husband for at least four or five years.

Further evidence of the applicant

31. The Tribunal referred to the process under s.359AA of the Act. The Tribunal referred to the evidence of the sponsor that the applicant had been living in [Town 1] over the course of their relationship for three or four days by himself and the sponsor would then spend weekends with the applicant for about three days. This was inconsistent with the information provided by the applicant and undermined his credibility. It also indicated that the parties were not living together and the sponsor was not dependent upon the applicant for any emotional support. This indicated that the nature of the relationship of the applicant and the sponsor would not be a compelling reason for not applying the Schedule 3 criteria.
32. The applicant said that he had his home in [Town 1] and when he started his relationship with the sponsor he kept his property in [Town 1] as he had his furniture there and his [Animal 1]. He said that he had to return to [Town 1] every week for two or three days to feed the [Animal 1] and look after them. He said that he could not take the [Animal 1] to the sponsor's home in Melbourne because there were too many of them.
33. The Tribunal indicated that it was not plausible that the applicant would maintain a property in [Town 1] and stay there for two or three days a week just to look after [Animal 1]. The claims being made by the applicant that he was staying in [Town 1] only two or three days a week were also inconsistent with the information provided by the sponsor which was that he was in effect living in [Town 1] and she was visiting him for about three days a week on weekends.
34. The applicant said the sponsor was wrong. He said that he would only go to [Town 1] for two or three days each week and then the sponsor would join him and then they would return to Melbourne.
35. The applicant's agent requested a further three weeks to provide a psychological report on the sponsor. The applicant was given until 11 September 2020 to provide the report.

Post-hearing information

36. After the hearing, the following documents were provided by the applicant:
 - Letter from [Dr B] dated 20 August 2020;
 - Report from [Ms C], physiotherapist, dated 7 May 2020;

- Discharge notice from a [Country 1] hospital dated [date] July 2019; and
 - Letter from the sponsor's superannuation fund confirming the applicant had been nominated as a 100% beneficiary.
37. The letter from [Dr B] stated that he had consulted the sponsor [in] May 2020 in respect of dizziness and diagnosed [medical condition] and she had been referred to a physiotherapist. She consulted him again [in] July 2020 after the failure of IVF treatment and had been referred to [Mr D], psychologist.
 38. The hospital discharge notice stated the sponsor had been treated for [medical condition], and had undergone a [surgery].
 39. The report from [Mr D], psychologist, dated 31 August 2020 stated that he had been treating the sponsor since 29 July 2020. After conducting two tests, he concluded the sponsor was suffering from a major depressive episode with anxious distress, reactive to chronic stress created by the joint effects of the prospect of separation from the applicant if he was required to return to Malaysia and persistent disappointment of failed IVF. There was no indication of any continuing treatment or involvement of the applicant in any such treatment. There was no mention that the sponsor was suffering from any mental health issues arising from any claim that she had suffered family violence from any previous partner.
 40. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

41. The issue in the present case is whether the applicant satisfies the Schedule 3 criteria and, if he does not, if there are compelling reasons for not applying those criteria.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

42. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003 and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
43. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.

Criterion 3001

44. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2). In the circumstances of the applicant, the relevant day is the last day he held a substantive visa.
45. The applicant's last substantive visa expired on 23 February 2013. This is more than four years prior to the filing of the current application.
46. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

47. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
48. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
49. The applicant has previously applied for a Protection visa which was refused by the Department. A review of that decision by the Tribunal affirmed the Department's decision and appeals against that decision by the applicant were dismissed. No further information has been provided which would indicate that if the applicant were required to return to Malaysia that he would face any difficulties or harm for any reason.
50. The applicant's evidence was that his father had a business in the [markets] and that he had no problems there. There is no information to indicate that any member of the applicant's family in Malaysia or the applicant himself has ever been threatened or faced any difficulties there. As the applicant's father has for a number of years run a successful business, it is likely that the applicant would obtain the support of his family if he were required to remain in Malaysia while any offshore Partner visa application was processed. He has a number of other family members living in Malaysia who would be able to provide him with emotional support.
51. The Tribunal has taken into account the current political situation in Malaysia. There is nothing to indicate that the applicant or his family would in any way be directly affected by any political disturbances or elections that may take place in Malaysia. The Tribunal has also taken into account the current worldwide COVID-19 pandemic. There is nothing to indicate that the Malaysian authorities are not taking appropriate steps to restrict the spread of the virus and protect the health of its citizens. There is nothing to indicate that the applicant would face any greater threat of contracting the virus in Malaysia than if he remained in Victoria. The Tribunal notes the current travel restrictions to Australia as a result of the COVID-19 pandemic. The restriction on travel to Australia is a situation that faces all people who have applied for an offshore Partner visa. It would be hoped that in the foreseeable future the COVID-19 pandemic would be controlled by the development of a vaccine or some other control of its spread. When compared to other areas, such as the United States and Europe, the situation with regards to the COVID-19 pandemic in Malaysia does not provide a compelling reason for not applying the Schedule 3 criteria.
52. When considering all the circumstances that the applicant would face if he were required to return to Malaysia to apply for any offshore Partner visa, the Tribunal is not satisfied that those circumstances provide a compelling reason for not applying the Schedule 3 criteria.
53. The Tribunal has not made any critical assessment of whether, at the time of the application or at the time of this decision, the parties were in and continued to be in a genuine, continuing and exclusive relationship. The Tribunal has accepted at face value the claims made by the parties that they were and continue to be in a genuine relationship together and the circumstances of that claimed relationship for the purposes of this decision.

54. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). If the relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship. The Tribunal has considered all the aspects of the relationship, including the fact that the parties claim to be in a relationship, the length of the claimed relationship, the nature and the extent of the bonds between the parties, and the consequences of any separation even if only for a limited time while an offshore application is being processed when considering if there are compelling reasons for not applying the Schedule 3 criteria.
55. It is claimed that the parties are in a long-standing relationship and this provides a compelling reason for not applying the Schedule 3 criteria. This submission relies upon, in part, the Explanatory Statement. The Explanatory Statement, providing examples of compelling reasons, states:
56. where the applicant and his or her nominator are already in a long-standing relationship which has been in existence for two years or longer... In these circumstances, waiver **may** be justified by the hardship which could result if the Schedule 3 criteria were not waived (Tribunal's emphasis).
57. The Tribunal is required to apply the legislation which states that it must be satisfied there are compelling reasons for not applying the Schedule 3 criteria. As is stated in *SZEXP v MIBP* [2015] FCAFC 69 at paragraph 17:
58. Context, such as legislative history or extrinsic materials, is a guide to the meaning of the statute but it "cannot displace the meaning of the statutory text" and it is the meaning of the statutory text which is where the task of statutory construction begins and ends: *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2013) 250 CLR 503, 519.
59. The Explanatory Statement and any guidelines produced by the Department do not provide criteria which, if met, satisfy the requirements of the legislation. As was stated by Logan J in *Singh v Minister for Home Affairs* [2020] FCCA 3180 at paragraph 8:
60. A statement in an explanatory statement in respect of subordinate legislation cannot be a substitute or proxy for its text any more than an explanatory memorandum can be in relation to the text of a statute.
61. If the nature of the relationship between the applicant and the sponsor were to be a compelling reason for not applying the Schedule 3 criteria, all the factors of the relationship, including its duration, the level of financial and emotional commitment, the dependence the parties have upon each other and all other relevant factors must be considered. As is made clear in the Explanatory Statement, the examples provided only may justify the waiver of the Schedule 3 criteria. They do not provide a criterion that, if satisfied, becomes a compelling reason for not applying the Schedule 3 criteria and the Explanatory Statement is not part of the statutory text which is to be considered.
62. The sponsor has been undergoing IVF treatment for a number of years. This treatment has been unsuccessful. This is the unfortunate reality of many women who undertake IVF treatment, particularly of the age of the sponsor. At this time, the sponsor has not been able

to fall pregnant through IVF and there is no information which would indicate the sponsor is likely to fall pregnant in the foreseeable future.

63. Although it may be unfortunate that the applicant and the sponsor do not seem to be able to have a child together, the Tribunal is not satisfied that this provides a compelling reason for not applying the Schedule 3 criteria. As indicated above, this is a circumstance that faces many couples. The sponsor has been undergoing IVF treatment for some time without success. There is nothing to indicate that she is likely to become pregnant through IVF in the foreseeable future. Although this may be distressing for her, the Tribunal is not satisfied that this provides a compelling reason for not applying the Schedule 3 criteria. The sponsor's mental health issues are discussed below.
64. The parties claimed that they were dependent upon each other for support. This is not consistent with the information provided by the parties at the hearing. The evidence of the parties was that while the sponsor was living in Melbourne in her home the applicant was spending a considerable period each week living in the home he was renting in [Town 1]. The explanation for this was that he was required to look after his [Animal 1].
65. The Tribunal has significant concerns as to the evidence of both the applicant and the sponsor as to the amount of time the applicant was living in [Town 1] and if the sponsor spent any time there at all. Although it was claimed the applicant was living in [Town 1] for between two and three days each week, the Tribunal does not accept this. It appears that the applicant has been involved in organising work for Chinese and Malaysians in the [Town 1] area. He maintained a home in [Town 1]. Although the applicant claims he is not working, it was acknowledged that the business the sponsor had was arranging for work for Malaysians in Chinese and was done with the "assistance" of the applicant because she did not speak Malay or Chinese and relied upon the applicant to organise the work for these people arriving in Australia.
66. The primary reason the applicant claimed he retained his home in [Town 1] was that he needed to care for his [Animal 1]. It is inherently unlikely that if the sponsor is so dependent upon the applicant that she would not be able to be separated from him while any offshore Partner visa application was being processed that he would consider spending a considerable period each week in [Town 1] due to the need for him to care for his [Animal 1]. That he gave this explanation as to why he maintained his home in [Town 1] and did not live with the sponsor in Melbourne indicates a lack of dependence on each other and the capacity of each of them to properly function while separated.
67. The sponsor has travelled overseas on numerous occasions over the period that the parties claim to have been in a relationship. The Tribunal accepts that on some occasions she has done so to be able to access medical treatment in [Country 1] associated with her IVF treatment. The fact that the sponsor has been willing to travel overseas without the applicant indicates that she is not so dependent upon him that she is not able to cope with being separated from him for an extended period of time. The applicant claimed that he and the sponsor were together on New Year's Eve 2019–2020. This is not correct. The sponsor was overseas at that time. The applicant claimed that this error was caused due to the fact that he has a bad memory.
68. The Tribunal does not accept that a poor memory would lead to the applicant failing to remember where he and the sponsor were on New Year's Eve 2019–2020. That he said that he and the sponsor were together at that time and claimed she had last been overseas in September 2019 undermines his credibility and also calls into question whether he and the sponsor have been living together or any dependence they have upon each other. There is nothing to indicate that the sponsor was not able to continue to work and study in Melbourne while the applicant was living in [Town 1], even if it was for only a limited time each week.

69. It was claimed that the sponsor was dependent upon the applicant for her emotional support due to her having suffered family violence in a previous relationship, the failure of her IVF treatment and her concern about the applicant having to return to Malaysia. Although the applicant had been undergoing IVF treatment for some period of time, it only appears that she was referred to any psychologist for mental health treatment immediately before the hearing before the Tribunal. The report from [Mr D], psychologist, indicates she only first sought treatment on 29 July 2020. The report makes no mention of the sponsor suffering any mental health issues arising from any family violence that she had previously suffered. As the sponsor has been undergoing various treatment for IVF for a number of years, it is inherently unlikely that if she was suffering from any mental health issues arising from the failure of this treatment that it would only be shortly before the hearing before the Tribunal that any of the many health professionals she had been consulting would have referred her to a psychologist for treatment. The same may be said in respect of any concern she had about the applicant having to return to Malaysia and being separated from her for any period of time. As no mention is made by [Mr D] of the sponsor suffering any issue as a result of having been the victim of family violence and there is no other evidence to support this claim, the Tribunal is led to conclude that the sponsor is not dependent upon the applicant for any issue arising from any family violence claim.
70. The sponsor now claims that she is living with the applicant in [Town 1]. She claims to be running a business finding work for Malaysians in Chinese, although it appears that the applicant is the primary owner and organiser of that business. She is also working in a [Workplace] [doing Job task 1]. There is nothing to indicate that she is not able to support herself should the applicant be required to return to Malaysia to apply for any Partner visa offshore. Although the business the sponsor claims to run finding work for Malaysians in Chinese in the [Town 1] area is unlikely to continue without the presence of the applicant, the Tribunal places no weight on this fact, noting the applicant does not have any work rights in Australia. Although the parties may face increased financial difficulties as a result of the applicant having to return to Malaysia, these are the circumstances that face almost all couples where an offshore Partner visa application is made.
71. As indicated above, the sponsor has been willing to travel overseas for extended periods while the applicant has remained living in Australia. Although the current COVID-19 pandemic has imposed travel restrictions into Australia, the fact that the sponsor has been able to travel overseas indicates that while any offshore Partner visa application was being assessed the sponsor would otherwise be able to travel overseas to spend time with the applicant. These are the circumstances that face most couples who are required to apply for an offshore Partner visa. As indicated above, the travel restrictions as a result of the COVID-19 pandemic would not allow any short-term overseas travel by the sponsor, however, the Tribunal is not satisfied that this would provide a compelling reason for not applying the Schedule 3 criteria.
72. The Tribunal has considered all the circumstances of the claimed relationship between the applicant and sponsor. In particular, the Tribunal has taken into account the claims made by the parties that they have been undergoing IVF treatment which has been unsuccessful and the claimed emotional support the applicant is providing to the sponsor. The Tribunal has taken into account the length of the claimed relationship and the fact that the parties have now been living together in [Town 1] for about one and a half years. The Tribunal is not satisfied that any of the circumstances of the relationship between the applicant and the sponsor, both individually and cumulatively, provide a compelling reason for not applying the Schedule 3 criteria.
73. The Tribunal has assessed the circumstances of the applicant and the sponsor both individually and cumulatively. As set out above, the Tribunal is not satisfied that the individual circumstances of the parties and in particular the claims made by the parties when

considered on an individual basis provide a compelling reason for not applying the Schedule 3 criteria. The Tribunal is not satisfied that when considered in combination the total circumstances of the parties both individually and together provide a compelling reason for not applying the Schedule 3 criteria.

74. The Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii). There is nothing before the Tribunal to indicate the applicant would meet any of the alternate criteria in cl.820.211.
75. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

76. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Hugh Sanderson
Member